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c/t. 655. Sxt.

Office Supreme Court U.S.
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JAMES H. McKENNEY,
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Supreme Court of the United States.

Filed April 29, 1901.

ANTON MENCKE, master of the British ship BENLARIG,
Libellant and Petitioner,

against

A CARGO OF JAVA SUGAR, whereof, ARBUCKLE BROTHERS, are
Claimants, Respondents.

655.

BRIEF FOR RESPONDENTS.

While the *Benlarig* was at sea between Philadelphia and Java, her owners entered into a charter-party of the ship to Erdmann & Sielcken, merchants of Batavia, Samarang, and Sourabaya. The charter-party was made and signed in London July 1, 1898, and was executed on the part of the charterers by an agent.

The engagements of the charter-party, so far as material to the present hearing, were that the *Benlarig* should, after discharging her outward cargo, take on board in Java from the charterers:

> "A full and complete cargo of dry sugars * * * "and being so loaded * * * therewith proceed to "Barbados; thence to proceed to Delaware Break- "water for orders to discharge at New York, Bos- "ton or Philadelphia or Baltimore, or so near the "port of discharge as she may safely get, and de- "liver the same, always afloat, in a customary "place and manner in such dock as directed by "charterers, agreeably to the bills of lading" (*Charter-party, Record, p.* 6; *fols.* 23, 24).

Upon the cargo being shipped in Java, bills of lading were issued reciting that the shipment was made pursuant to all the conditions and exceptions of the charter-party (*Exhibits B, C, D, E, pp.* 12–15).

The respondents, Arbuckle Bros., purchased the cargo thus documented, and became entitled to delivery thereof, according to the provisions of the charter-party and bills of lading (*Gilmour, p.* 105, *fol.* 418).

Upon arrival of the *Benlarig* in New York, Arbuckle Bros. ordered her to discharge at their refinery (*Exhibit* 7, *p.* 31, *fols.* 121, 122).

The designated berth was above the Brooklyn Bridge, and the ship's agent made reply that it would be impossible for the *Benlarig* to pass under the Bridge, because of the vessel having steel masts all in one piece, and that she would be unable, therefore, to house her topmasts in the usual manner and proceed to the dock to which she had been ordered (*Exhibit* 9, *pp.* 32, 33, *fols.* 128, 129).

It was thereupon agreed between the parties that the cargo should be discharged into lighters below the Bridge without prejudice to the rights of the parties under the charter-party (*Exhibit* 12, *p.* 35, *fols.* 138, 140; *Exhibit* 13, *p.* 36, *fols.* 142, 143).

Thereupon the *Benlarig* proceeded to discharge at a pier in the Atlantic Basin (*Exhibit* 14, *p.* 37, *fols.* 145, 146).

Upon discharge of the sugars they were lightered from Atlantic Basin to Arbuckle Bros.' refinery at a cost of $1,466.04 (*Gilmour, pp.* 99, 100, *fols.* 396, 398).

Arbuckle Bros. deducted the cost of lighterage from the freight.

Thereupon this suit was brought by the master of the *Benlarig* claiming the unpaid amount.

The District Judge sustained the libel (*Opinion, pp.* 108–114; *Decree, pp.* 114, 115).

Upon appeal to the United States Circuit Court of Appeals that court reversed the decree of the District Court and directed that the libel be dismissed.

POINTS.

First.

THE DISCHARGING BERTH TO WHICH THE BENLARIG WAS ORDERED WAS SAFE FOR VESSELS OF HER CLASS, AND A PROPER AND USUAL PLACE OF DISCHARGE, AND SHE SHOULD HAVE PROCEEDED THERE OR SHOULD HAVE DELIVERED HER CARGO THERE OTHERWISE AT HER OWN EXPENSE.

The extracts from the charter are usual provisions in Java sugar charters (*Gilmour, p.* 102, *fol.* 408).

The printed forms are used, not only to cover one branch of business, but all branches, and contain, therefore, general provisions adapted to a wide range of ports.

There were certain obligations resting upon the *Benlarig* prior to her arrival at the port of discharge, and certain others resting upon her after arrival at the port of discharge.

The obligations resting upon her prior to her arrival at the port of discharge were to proceed from Delaware Breakwater "to discharge at New York * * * or so near "the port of discharge as she may safely get" (*Charter-party, p.* 6, *fol.* 24).

The words "so near the port of discharge as she may "safely get," would not often be pertinent in connection with such a port of discharge as New York. They would be pertinent in the case of some ports where navigation is subject to interruption by ice, or where shallow bars forbade entrance to other than small craft.

In case of war, New York might become an unsafe port, and then the provision would find application.

In fact, however, the steamer did actually reach the port of New York, and it is material, therefore, to consider only the obligations which rested upon her after her arrival at that port.

Such obligations were to deliver her cargo "always afloat" in a customary place and manner in such dock as

directed by charterers" (*Charter-party, pp.* 6, 7; *fols.* 24, 25).

The sequence of the specified conditions is significant.

First, there is a general provision that the vessel must lie "always afloat."

Next, there is a provision still further restricting the charterers in that the place of discharge must be "a cus- "tomary place," and the manner of discharge, "a cus- "tomary manner."

Finally, within these restrictions, the shipowners agreed to send their vessel to the dock designated by the charterers.

The depth of the water at the place designated by Arbuckle Bros. was ample for the vessel to lie "always afloat" (*Gilmour, p.* 105, *fol.* 420; *Meucke, p.* 43, *fol.* 172), and the "largest vessels go there" (*Smith, p.* 78, *fol.* 312).

Arbuckle Bros. have a large business as refiners. They have acquired property on deep water front, to facilitate delivery of cargoes to them without intermediate drayage or lighterage.

They go into the market and buy full cargoes of sugar, that they may have the right to order vessels to their own refinery to discharge, and thereby save the expense that would otherwise be incurred for lighterage or drayage (*Gilmour, p.* 103, *fol.* 410).

The place to which the *Benlarig* was ordered to discharge was a "customary place." It is indisputed upon the proofs that fully *eighty per cent.* of the sugars arriving in New York is delivered at the large refineries above the Brooklyn Bridge (*Macdougall, p.* 65, *fols.* 258, 259; *Smith, p.* 78, *fol.* 312; *Gilmour, p.* 100, *fol.* 398).

If the charter had specifically stated that the *Benlarig* was to discharge at Havemeyer's Refinery, or at Arbuckle's Refinery, or at any of the other great refineries on the East River above the Bridge, the shipowner could not make an arguable contention that he was relieved from delivering the cargo at the designated dock by reason of his masts being too tall to pass beneath the Bridge.

In view of the character of the cargo, and the naming of the port, and the customary place of discharge of sugars in such port, the charter is to be taken as an engagement by the shipowner to make delivery of the sugars, if required by the cargo owners, above the Bridge.

Second.

THE LIGHTERAGE CLAUSE OF THE CHARTER DOES NOT RELIEVE THE CHARTERERS FROM THE OBLIGATIONS OF PROCEEDING TO OR DELIVERING THE CARGO AT A DESIGNATED DOCK ABOVE THE BRIDGE.

The clause is:

> "4. All goods to be brought to and taken from "alongside the ship always afloat at the said char- "terers' risk and expense, who may direct the same "to the most convenient anchorage; lighterage, if "any, to reach the port of destination, or deliver "the cargo at port of destination, remains for ac- "count of receivers, any custom of the port to the "contrary notwithstanding" (*Charter party, p. 7, fol. 27*).

The shipowner has contended that under this clause the burden of transporting the sugars from the place of actual discharge to the designated dock must fall upon the cargo.

To give the clause this construction sets the other clauses of the charter-party at naught.

The contention, if allowed its full range, would permit the vessel to refuse to proceed further, and to insist upon discharging as soon as she reached a place from which lighterage to the dock desired by charterers was feasible. The fallacy of the argument is made otherwise apparent by considering that where the vessel refuses to proceed to the dock designated, the liability for expense of carrying the cargo thither would be made to depend upon whether

trucks, drays or railways were used to complete the distance or whether lighters were so used.

The lighterage clause has reference, at most, only to cases in which the vessel has already performed her whole duty under the contract. There are many cases where the clause becomes operative and of importance as where portions of the cargo need to be distributed to different destinations within the port away from the dock originally designated; or again, where the vessel is relieved from proceeding to the designated dock because she cannot lie safely "always afloat" at such dock; or again, where she cannot reach the port itself; or again, where the charterers elect to have the vessel discharge at an anchorage; or again, where vessels ordinarily discharge at an anchorage, as in Havana.

The lighterage clause, in substantially the form used in this charter, has had a wide use for many years, and its reach is fully understood by the shipping world. It has no application except to cases where the vessel is excused by other provisions in the charter-party from delivering her cargo at the dock desired by the consignees.

Such is the testimony of all the experts (*MacDougall*, *pp.* 66, 67, *fols.* 264, 265; *Snow*, *p.* 74, *fols.* 294, 295; *p.* 75, *fol.* 297; *p.* 76, *fol.* 302; *Smith*, *p.* 78, *fol.* 311; *p.* 81, *fols.* 322, 323).

The rule is well phrased by one of the witnesses:

> "Q. The question is whether this clause compels
> "the charterers to pay lighterage under all circum-
> "stances where lighterage is necessary? A. I don't
> "see the necessity of the lighterage.
> "By the Court: Q. Supposing there is a necessity
> "for it, who is to pay the lighterage? A. *If the*
> "*ship had performed her duty and after that there*
> "*was a necessity for it the charterer would have*
> "*to pay it* (*Snow*, *pp.* 74, 75, *fols.* 296, 297)."

In this case the ship had not performed her duty because she had not proceeded to the customary place of discharge designated by Arbuckle Bros.

Third.

WHERE DIFFERENT CONSTRUCTIONS OF A CONTRACT ARE POSSIBLE, SUCH CONSTRUCTION SHOULD BE CHOSEN AS MAY FAIRLY BE INFERRED TO HAVE BEEN THE INTENTION OF THE PARTIES VIEWED IN THE LIGHT OF ALL FACTS.

The owners of the *Benlarig* chartered her to carry a cargo of sugars to one of several designated ports, among them, New York.

The usual place to discharge such cargoes in New York is above the Bridge, where fully four-fifths of the sugar is, and for many years has been, discharged.

With perhaps a dozen exceptions, all the vessels in the world are able to pass under the Bridge by simply housing the light upper masts (*Gilmour, p.* 101, *fol.* 403; *Smith, p.* 82, *fol.* 328; *Macdougall, p.* 67, *fol.* 268).

The construction of the *Benlarig's* masts was not only unusual, but the style was novel (*Gilmour, p.* 101, *fol.* 402).

Masts in single pieces of the height carried by the *Benlarig* are so rare as not to charge merchants with any responsibility of investigation.

It is more reasonable to require the shipowner to assert his disabilities and to insert in the charter-party due provision exempting him from sending his vessel above the Bridge (*Smith, p* 78, *fol.* 310; *Brooks, p.* 92, *fol.* 365).

Fourth.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Respondents.

WILHELMUS MYNDERSE,
Advocate.